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CITATIONS

261744—40

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 433

CANADIAN RIVER GAS COMPANY, A CORPORATION, AND COLORADO INTERSTATE GAS COMPANY, A CORPORATION, PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The original opinion of the Circuit Court of Appeals (R. 39–47) is reported in 110 F. (2d) 350. Its opinion on the petition for rehearing (R. 60–64) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 4, 1940 (R. 47). A petition for rehearing filed by petitioners was denied on

July 24, 1940 (R. 64). The petition for a writ of certiorari was filed September 14, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

The Federal Power Commission issued two general orders directing all natural gas companies to supply certain information to aid the Commission in determining whether they were "natural gas companies" within the meaning of the Natural Gas Act of June 21, 1938 (and so subject to the jurisdiction of the Commission), and further directing them to file schedules of their rates for sales of gas subject to the Commission's jurisdiction. Petitioners complied with these orders. Thereafter the Commission ordered an investigation of petitioners' rates, practices, and contracts subject to the jurisdiction of the Commission. The order recited that it appeared to the Commission that petitioners were natural gas companies within the meaning of the Natural Gas Act. The questions presented are:

1. Whether the Commission's order of an investigation is subject to judicial review under Section 19 (b) of the Natural Gas Act; and

2. Whether, under that section, the Circuit Court of Appeals was without power to entertain a motion by the Commission to dismiss for want of jurisdiction, because the Commission had not filed a copy of the transcript of proceedings on which the order was based.

STATUTE INVOLVED

The pertinent portions of the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821, are set out in the Appendix.

STATEMENT

Petitioners, the Canadian River Gas Company and the Colorado Interstate Gas Company, hereafter referred to as the Canadian Company and the Colorado Company, respectively, are Delaware corporations (R. 1, 20, 26). The Canadian Company is engaged in the production and transportation of natural gas, and owns and operates a gas pipe line extending from the Amarillo Field in Texas to Clayton, New Mexico (R. 2, 8, 20, 26). The Colorado Company is engaged in transporting natural gas to various places in Colorado, and operates a gas pipe line from Clayton, New Mexico, to a point near Denver, Colorado (R. 8, 20, 26, 40). Gas is sold by both companies by private contract only (R. 2, 38).

The Federal Power Commission, on July 5, 1938, issued two general orders, Nos. 51 and 53 (R. 13–20.) Order No. 51 directed all natural gas companies to furnish certain information respecting their operations, to aid the Commission in determining whether they were "natural-gas companies" within the meaning of the Natural Gas Act. (If the companies were "natural-gas companies" within the meaning of the Act, they were subject to the jurisdiction of the Commission.) Order No.

53 directed the companies to file schedules of all rates subject to the Commission's jurisdiction. Petitioners complied with these orders, but stated that their compliance was under duress and that the Commission did not have jurisdiction over them under the Natural Gas Act (R. 2, 25).

The Colorado Company had for some years sold gas, under a contract, to the Public Service Company of Colorado (R. 5, 22). The gas so sold was purchased by the Colorado Company from the Canadian Company (R. 2, 5, 26). On December 22, 1938, the City and County of Denver filed a complaint with the Commission against petitioners and the Public Service Company, alleging that the Colorado Company's price for gas to Public Service was unreasonable, and praying that the Commission fix reasonable rates (R. 21–22). On March 14, 1939, the Commission ordered that an investigation be instituted to determine whether petitioners' rates were unreasonable and, if the rates were found to be so, to fix new rates (R. 20–23). The order recited that it appeared to the Commissioner that petitioners were both engaged in interstate commerce and were natural-gas companies within the meaning of the Natural Gas Act (R. 21). An application by petitioners for a rehearing and stay of the order of March 14, 1939 (R. 23–25), was denied by the Commission on May 9, 1939 (R. 37–38).

Petitioners, pursuant to Section 19 (b) of the Natural Gas Act, petitioned the court below to review the order of March 14, 1939 (R. 1–11). The Commission's motion to dismiss (R. 39) was sustained upon the ground that the order for investigation did not of itself adversely affect petitioners' rights and did not require obedience to any other order with which petitioners had not complied (R. 39–47).

Petitioners petitioned for rehearing (R. 48–59), asserting that since the issuance of the order of March 14, 1939, the Commission had issued three general orders, Nos. 63, 65, and 69, directing all natural gas companies as defined in the Natural Gas Act to make certain financial, statistical, and rate reports and to follow a prescribed accounting procedure; that petitioners had not complied with any of these orders; and that Sections 4, 7, 8, and 10 of the Act, dealing with the export of gas, abandonment of facilities, the Commission's access to records of the gas companies, and periodic reports of such companies to the Commission, would all automatically become applicable to petitioners because of the Commission's recital in its order of March 14, 1939. Petitioners further contended that the court was without jurisdiction to dismiss on motion of the Commission because the Commission had failed to file with the court a transcript of the proceedings on which the order of March 14, 1939, was based.

The petition for rehearing was denied (R. 60–64). The court held that whether the order of March 14, 1939, was subject to review must be determined as of the date of the petition for review (R. 60). It did not consider the application of Sections 4, 7, 8, and 10, or the further question of its jurisdiction to entertain the motion.

ARGUMENT

1. The decision of the court below follows principles which have been laid down by this Court. An order of an administrative body instituting an investigation, like an order setting a case down for hearing is not subject to judicial review. *United States* v. *Illinois Central R. R. Co.*, 244 U. S. 82; cf. *Federal Power Comm'n* v. *Edison Co.*, 304 U. S. 375, 385–386. Such an order "does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action." *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 130.

In the *Rochester* case, which petitioners invoke, this Court held that an order of the Federal Communications Commission determining that the company was subject to its jurisdiction and hence was bound by prior general orders directing all such companies to file their charges and certain documents and information with the Commission, was reviewable in the courts, and that the form of the order, whether negative or affirmative, was immaterial. In *Valvoline Oil Co.* v. *United States*,

308 U. S. 141, also relied upon by petitioners, the facts were substantially identical with those of the *Rochester* case, and the right to judicial review was not contested or discussed.[1]

These decisions do not aid petitioners, since they had already complied with the Commission's prior orders Nos. 51 and 53. Moreover, the statement in the order for investigation that petitioners were "natural gas companies" within the meaning of the Natural Gas Act was, as the court below said, "a mere preliminary finding" (R. 62). Unlike the orders reviewed in the *Rochester* and *Valvoline* cases, it does not purport to make applicable to petitioners any other orders of the Commission. It was entered without notice or hearing (R. 24), and the jurisdictional issue is one of the questions for determination after full hearing.[2] Petitioners' effort to obtain judicial

[1] In the *Valvoline* case, as fully appears from the opinion of the district court (25 F. Supp. 460), the Interstate Commerce Commission had issued a general order directing all pine-line companies subject to its jurisdiction to file certain documents and information with the Commission. The Valvoline company contended that it was not a common carrier subject to the Commission's jurisdiction and petitioned the Commission to grant a hearing on the question. The petition was granted, and after two full hearings the Commission found that the company was subject to its jurisdiction and directed the company to comply with its general order.

[2] Petitioners applied to the Commission for a "rehearing" in respect of the challenged order upon the ground, *inter alia*, that they were denied notice and an opportunity to be

relief before their administrative remedy is exhausted is "at war with the long-settled rule of judicial administration." *Federal Power Comm'n* v. *Edison Co., supra,* at 385; *Rochester Tel. Corp.* v. *United States, supra,* at 130–131.

Petitioners contend that the Commission's recital in its order for investigation subjects them to the Commission's subsequent orders and to the provisions of Sections 4, 7, 8, and 10 (a) of the Natural Gas Act, and that the order for investigation is therefore reviewable. But the Commission's preliminary statement as to jurisdiction is not final and does not purport to make applicable to petitioners the cited provisions of the Natural Gas Act or any other orders of the Commission. And there are other and equally conclusive answers to the contention. Sections 4, 7, and 8 of the Natural Gas Act are inoperative since the petitioners are not attempting to export gas or abandon their facilities, and since the Commission has not ordered petitioners to give the Commission access to their records or accounts. Section 10 (a) does not impose any obligations on petitioners to file reports except as the Commission may by regu-

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heard (R. 23, 24–25). The Commission denied the application, relying on its prior opinion in *Re East Ohio Gas Company*, 28 P. U. R. (N. S.) 129 (R. 37–38). There is nothing in that opinion to suggest that petitioners would be denied a full hearing on the jurisdictional issue before issuance of any final order, and, in fact, the Commission has granted such hearings in other proceedings.

lation require. So far as appears, the only reports required by the Commission under this section with which petitioners have not complied are those prescribed by orders Nos. 63, 65, and 69. It has never been held that such subsequent orders render reviewable an earlier order which was not reviewable when issued, which may have been years before.

2. Section 19 (b) of the Natural Gas Act directs the Commission, upon receipt of a petition for review, to file a certified copy of the record, and declares that "Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part." Petitioners contend that, since the Commission had not filed the record, the court below was without jurisdiction to entertain the Commission's motion to dismiss.

As has been shown, the court below was without jurisdiction to afford the review sought by petitioners, and since this lack of jurisdiction was apparent on the face of the petition for review surely the court was not required to await the filing of the record before dismissing the petition for review. A more dilatory procedure would have resulted only in added expense.

The question presented by this contention is, moreover, unimportant and presents no conflict of decision. In this connection petitioners cite only *In the Matter of the National Labor Relations Board,* 304 U. S. 486. There an employer sought

review in a circuit court of appeals of an order which had been entered against it by the Board. Thereafter the Board vacated its order and restored the case to its docket for reconsideration; accordingly it did not file in the court a certified copy of the transcript of record. The circuit court of appeals thereupon enjoined the Board from taking any further steps in the cause until the transcript was filed. On application of the Board for writs of mandamus and prohibition this Court held that the circuit court of appeals was without jurisdiction to enter its order. "Since the statute empowers the Board, before the filing of a transcript, to vacate or modify its orders, certainly it does not confer jurisdiction upon the reviewing court to prohibit the exercise of the granted power" (304 U. S. at 494). This holding is, of course, far removed from the question, here presented, whether the circuit court of appeals could dismiss the petition for review without awaiting the filing of the record since it appeared from the face of the petition that the court was without jurisdiction to entertain it. Petitioner quotes (p. 11) the remark of this Court in its opinion in the *Labor Board* case that the circuit court of appeals had no jurisdiction "to take action at the behest of the Board" until the transcript was filed. This statement had reference to a petition by the Board for enforcement of its order, and does not bear upon the question at bar.

CONCLUSION

The petition presents no doubtful question of public importance, and there is no conflict of decisions. It is therefore respectfully submitted that the petition should be denied.

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